

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICES

PENNSYLVANIA HUMAN RELATIONS COMMISSION

OTIS OLIVER and :
JOSEPH WATSON, :
Complainants :
 :
v. : DOCKET NOS. E-18942
 : E-18943
MILEY SECURITY SERVICES, :
INC., :
Respondent :

FINDINGS OF FACT

1. During their employ with Respondent, Complainants worked as guards, assigned to the Acme warehouse on the corner of Thompson and 30th Streets in Philadelphia.

2. Oliver was assigned to a post across the street from the Acme warehouse.

3. Oliver was to remain across the street from the warehouse except when a truck was backing into the warehouse loading dock and while the truck was being unloaded.

4. Oliver was in the loading dock area at approximately 11:30 p.m. on September 10, 1980.

5. Oliver was not in the loading dock area to monitor a truck backing into the loading dock or unloading.

6. Oliver abandoned his post on September 10, 1980.

7. Watson was assigned to a post inside the warehouse.

8. It was Watson's responsibility to make sure that no unauthorized person entered the warehouse through the personnel entrance and to receive invoices from incoming truck drivers.

9. Watson was to make sure that the door to the personnel entrance was locked at all times.

10. Watson was permitted outside the warehouse only when it was necessary to investigate a situation immediately outside of his post.

11. Watson was in the loading dock area, outside of the warehouse and away from his post, at approximately 11:30 p.m., on September 10, 1980.

12. Watson was not in the loading dock area to investigate a situation.

13. Watson left the door to the personnel entrance to the warehouse unlocked and unattended at approximately 11:30 p.m., on September 10, 1980.

14. Watson abandoned his post on September 10, 1980.

15. Both Oliver and Watson were talking with a woman, who was not authorized to be on Acme property, in the loading dock area at approximately 11:30 p.m., on September 10, 1980.

16. Respondent terminated Complainants for abandoning their posts and permitting an unauthorized female on the premises on September 10, 1980.

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OTIS OLIVER and JOSEPH WATSON, : DOCKET NOS. E-18942
Complainants : E-18943

VS. : I.D. # 16253

MILEY SECURITY SERVICES, INC., :
Respondent :

COMPLAINANT'S PROPOSED
STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. The complainants herein are OTIS OLIVER, a black male who resides at 1605 West Nedro Avenue, Philadelphia, Pennsylvania, 19141; and JOSEPH WATSON, a black male, who resides at 4552 North Mole Street, Philadelphia, Pennsylvania, 19140.

2. The respondent herein is MILEY SECURITY SERVICES, INC., 977 Bristol Pike, Andalusia, Pennsylvania, 19020. The respondent employs four or more employees within the Commonwealth of Pennsylvania.

3. On September 16, 1980 complainants filed a notarized complaint with the Pennsylvania Human Relations Commission at Commission Docket Nos. E-18942 and E-18943.

4. On October 8, 1980, Commission staff served all parties to this action

with a copy of the complaint in a manner which satisfies the requirements of 1 Pa. Code 33.3L.

5. On September 18, 1981 the Commission notified the respondent that the investigation had resulted in a finding of probable cause and enclosed a copy of the finding.

6. Subsequent to the finding of probable cause, the Commission and respondent attempted to resolve the matter by conference, persuasion and conciliation, but were unable to do so.

7. In a letter dated May 7, 1982 the Commission notified the respondent that a public hearing had been approved in the above-captioned case.

8. Complainant OLIVER was hired by respondent as a security guard on August 13, 1980.

9. Complainant OLIVER was discharged by the respondent on September 12, 1980.

10. Complainant WATSON was hired by the respondent on April 16, 1980.

11. Complainant WATSON was discharged by the respondent on September 12, 1980.

12. Herbert Briley, a black male, was employed by the respondent in a supervisory position (holding the title "Lieutenant") on September 10, 1980 and was the shift supervisor on that date for the 4:00 p.m. to 12:00 p.m. shift at Acme Markets, Inc.

13. Anderson Early, a black male, was employed by respondent as a security guard at Acme Markets on September 10, 1980. Early initially informed Harold Davidson, a white male supervisory employee of the respondent, (holding the title "Lieutenant") of the incident that led to the termination of OLIVER and WATSON.

HOLL, SOMMAR & TRACY

BY:

Paul E. Holl
Paul E. Holl,
For the Respondent

Michael Hardiman
Michael Hardiman, Assistant
General Counsel
For the Commission on behalf
of the Complainants

Date:

April 25th, 1983

Date:

May 6, 1983

CONCLUSIONS OF LAW

1. Complainants are individuals within the meaning of the Pennsylvania Human Relations Act (the "Act").

2. Respondent is an employer within the meaning of the Act.

3. The parties and the Pennsylvania Human Relations Commission ("the Commission") have complied with the procedural prerequisites to a public hearing in this case.

4. The Commission has jurisdiction over the parties and subject matter of this action.

5. Complainants have the initial burden of making a prima facie showing of discrimination.

6. Complainants may make a prima facie showing of discrimination by producing evidence which shows:

- a. That they belong to a racial minority;
- b. That they were qualified for the job in question;
- c. That they were discharged; and
- d. That the job remained available after their discharge.

7. Complainants have carried their burden of making a prima facie showing of discrimination.

8. Once Complainants make a prima facie showing of discrimination, Respondent bears the burden of producing evidence that demonstrates a legitimate, non-discriminatory reason for dismissing Complainants.

9. Respondent has carried its burden of producing evidence that demonstrates a legitimate, non-discriminatory reason for dismissing Complainants.

10. If Respondent succeeds in producing evidence that demonstrates a legitimate, non-discriminatory reason for dismissing Complainants, Complainants have the opportunity to show that the reason proffered by Respondent is a pretext for unlawful discrimination.

11. Complainants have failed to show that the proffered legitimate, non-discriminatory reason for their dismissal is a pretext for unlawful discrimination.

OPINION

The tripartite formula for analyzing the evidence and allocating burdens of proof in a case of racial employment discrimination has been set forth by the U.S. Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). Under this formula, which has been adopted by the Pennsylvania Supreme Court for complaints under the Act, General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976), Complainant bears the initial burden of proving a prima facie case of unlawful discrimination. If Complainant succeeds, the burden shifts to Respondent to produce evidence which demonstrates a legitimate, non-discriminatory reason for its actions. If this is done, the burden reverts back to Complainant to establish, by a preponderance of the evidence, that the legitimate, non-discriminatory explanation proffered by Respondent is a pretext for unlawful discrimination. See U.S. Postal Services v. Aikens, _____ U.S. _____, 103 S.Ct. 1478 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1980).

The elements of a prima facie case in a complaint of discriminatory discharge are:

1. That Complainant belongs to a racial minority;
2. That Complainant was qualified for the job;
3. That Complainant was discharged;

4. That the job remained available after Complainant's discharge.

Ray v. Safeway Stores, 614 F.2d 727, 730 (10th Cir. 1980).

In the present cases, Complainants have established prima facie cases of unlawful discharge. They belong to a racial minority. They were qualified for the job, as indicated by their hire for the job and the lack of any contrary evidence. They were discharged from their jobs. Their jobs remained available immediately after their discharge.

However, Respondent submits that it discharged Complainants for a legitimate, non-discriminatory reason. Specifically, Respondent contends that Complainants allowed an "unauthorized female" on the premises to which they were assigned (Acme warehouse) on September 10, 1980, at approximately 11:30 p.m., which resulted in them abandoning their assigned posts and leaving the premises vulnerable to acts of theft or vandalism.

Respondent produced two witnesses, Herbert Briley and Howard Davidson, who testified that Complainants and at least two other guards had left their posts and were talking with an unauthorized female on the Acme warehouse premises, at approximately 11:30 p.m., on September 10, 1980. Also admitted into evidence is the report of Davidson describing the alleged incident. The testimony of Briley and Davidson is buttressed by the testimony of James Prince which defines the job duties of the persons assigned to Complainants' posts. Given this

evidence, we have no difficulty in concluding that Respondent has rebutted Complainants' prima facie showing of unlawful discrimination by demonstrating a legitimate, non-discriminatory reason for discharging Complainants.

The crux of this case is the third element of the McDonnell-Douglas formula, whether or not Complainants have established that the legitimate, non-discriminatory reason proffered by Respondent is, in fact, a pretext for unlawful discrimination. For the reasons that follow, we conclude that the preponderance of the evidence does not establish that Respondent's proffered reason for Complainant's discharge is pretextual.

Most importantly, we find that the evidence establishes that Complainants did abandon their posts. Oliver was assigned to a post across the street from the Acme warehouse facility. He was responsible for being in the loading dock area only when a truck was backing into the loading dock and while a truck was being unloaded. Yet, the evidence is clear that Oliver was in the loading dock area at approximately 11:30 p.m. on September 10, 1980, and there is no evidence that he was monitoring a truck backing in or being unloaded at the time.

Watson was assigned to a post inside the warehouse. It was his responsibility to guard the personnel entrance to the warehouse from the inside in order to make sure that no unauthorized person entered the warehouse and to receive

invoices from truck drivers. He was to make sure that the door to the personnel entrance was locked at all times. Watson was permitted to leave his post if necessary to investigate a situation immediately outside of his post but, even then, the door to the personnel entrance should be locked.

The testimony is clear that Watson was outside of the warehouse during his shift on September 10, 1980. Watson does not contend that he was outside of the warehouse to investigate an incident. Nor does Watson controvert Respondent's contention that the door to the personnel entrance was unlocked when he was outside of the warehouse.

Watson contends that he was properly outside of the warehouse for the purpose of monitoring the unloading of a produce truck. This contention conflicts with Oliver's testimony that no trucks were at the loading dock at the time of the incident. It also conflicts with the testimony of Davidson and Briley that Watson was talking to a woman at the time of the incident. Thus, we are not convinced that Watson was monitoring the unloading of a truck when he was outside of the warehouse on September 10, 1980. Nor are we convinced that it was Watson's responsibility to leave his post at the personnel entrance to monitor the unloading of trucks. Credible testimony from Prince, Davidson and Briley indicates that this was not one of Watson's functions. It

also should be noted that Watson has offered no explanation for leaving the door to the personnel entrance unlocked.

Thus, we find that Complainants did abandon their posts, leaving the warehouse vulnerable to acts of theft or vandalism.¹

Complainants urge us to find that Respondent's proffered reason for Complainants' dismissal is pretextual for a variety of other circumstances. Complainants contend that: Respondent has a record of discharging its black employees in numbers far in excess of their representation in Respondent's workforce, that white employees have either not been discharged or had been rehired after committing offenses similar to Complainants, and that Mr. Davidson has admitted the existence of possible racial animus for discharging Complainants. We find that these circumstances are insufficient to establish that Respondent's proffered reason for Complainants' dismissals is pretextual.

¹The record is insufficient to allow us to make a finding regarding the second alleged act of misconduct by Complainants, i.e., "having an unauthorized female on Acme property." Complainants deny that they invited the unauthorized female onto the premises and there is no evidence to the contrary. However, some of the testimony suggests that Complainants should have taken affirmative measures to have the unauthorized female removed from the premises and this they apparently failed to do. Regardless of whether or not Complainants acted improperly with respect to the unauthorized female, the fact that they abandoned their posts is sufficient to rebut Complainant's charges of racially-motivated dismissal.

It is well established that, although statistical evidence is of probative value for the purpose of showing intent, statistical evidence "is not determinative of an employer's reason for the action taken against the individual grievant." Terrell v. Feldstein Co., 468 F.2d 910, 911 (5th Cir. 1972). Thus, while the record reflects that, in 1981, 37% of Respondent's workforce was black and that 75% of the employees involuntarily terminated by Respondent were black, these facts do not show that the reasons proffered for Complainants' dismissals are pretextual.

Further, the evidence does not establish that any white guards were retained by Respondent after Respondent was aware of them committing acts of misconduct similar to those committed by Complainants. Fred Menke was found to have abandoned his post on August 22, 1980, but was not terminated until August 27, 1980, after another act of misconduct. However, Respondent contends that it did not receive the incident report concerning the August 22, 1980, incident until after Mr. Menke's termination. The evidence does not refute this contention.

Complainants also allege that their charges are supported by the fact that they were not re-hired, while white employees have been re-hired after being dismissed for abandoning their posts. However, the complaints filed by Complainants only allege discrimination regarding their dismissals. Complainants

have not alleged that Respondent refused to re-hire them in a discriminatory manner. Nor is there any evidence that Oliver even requested reinstatement. The fact that white employees have been re-hired, while Complainants were not, does not support their charges of discriminatory dismissal.

The final circumstance stressed by Complainants is Davidson's alleged admission at the fact finding conference of these cases that Complainants' terminations could have been racially motivated. Although at the hearing Davidson did not deny making this statement, we cannot accord substantial weight to this statement because Davidson was not in a position to know whether or not the termination decision were racially based. Davidson made the report upon which the decision to terminate Complainants was based but he was not involved in the decision-making process.

In short, the evidence fails to establish that the legitimate, non-discriminatory reason proffered by Respondent for Complainants' dismissal is pretextual. Consequently, we must find in Respondent's favor and dismiss the complaints.

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v.


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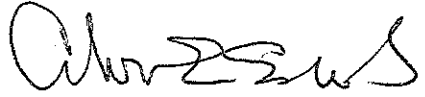
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RECOMMENDATION OF HEARING COMMISSIONERS

Upon consideration of the entire record in this case, the Hearing Commissioners conclude that Respondent did not violate Section 5(a) of the Pennsylvania Human Relations Act, and therefore recommends that the foregoing findings of fact, conclusions of law, and opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Act.


THOMAS L. MCGILL, JR.
HEARING COMMISSIONER


ALVIN E. ECHOLS, JR.
HEARING COMMISSIONER


DATE - March 25, 1985

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ORDER

AND NOW, this 28th day of March, 1985, the Pennsylvania Human Relations Commission hereby adopts the foregoing findings of fact, conclusions of law, and opinion, in accordance with the recommendation of the hearing Commissioner, pursuant to Section 9 of the Act, and therefore

O R D E R S

that the complaint in this case be, and the same hereby is, DISMISSED.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Joseph X. Yaffe
JOSEPH X. YAFFE, CHAIRPERSON

ATTEST:

John P. Wisniewski
JOHN P. WISNIEWSKI
ASSISTANT SECRETARY